No. 96-1252

MAR 12 1997

In The

Supreme Court of the United States

October Term, 1996

PROFESSIONAL MEDICAL INSURANCE COMPANY; PROFESSIONAL MEDICAL RISK RETENTION GROUP, IN LIQUIDATION,

Petitioners,

vs.

G. THOMAS MURFF,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF INTERNATIONAL ASSOCIATION OF INSURANCE RECEIVERS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI OF PROFESSIONAL MEDICAL INSURANCE COMPANY AND PROFESSIONAL MEDICAL RISK RETENTION GROUP, IN LIQUIDATION

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MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

The International Association of Insurance Receivers respectfully moves for leave to file a brief as *amicus curiae* in support of the Petition for a Writ of Certiorari filed by Petitioners, Professional Medical Insurance Company and Professional Mutual Risk Retention Group, in Liquidation. The *amicus curiae* brief is printed herewith in accordance with Rule 37 of the *Rules of the Supreme Court.*

ISSUE OF CONSENT

Ms. Cynthia Clark Campbell, the appointed deputy receiver of Professional Medical Insurance Company and Professional Mutual Risk Retention Group, in Liquidation has consented, on behalf of Petitioners to the filing of an *amicus curiae* brief. Mr. Kelly McClelland on behalf of Respondent, G. Thomas Murff refused to consent to the filing of an *amicus curiae* brief.

INTEREST OF MOVANT

The International Association of Insurance Receivers ("IAIR") is a nonprofit corporation whose membership is comprised of the receivers of insolvent insurance companies across the nation and overseas. IAIR was formed in order to enhance the standards governing insurance company receiverships. One of IAIR's stated purposes and objectives is to serve the public by promoting high

standards in the administration of insurance receiverships and the prompt and efficient closing of receiverships.

The issues raised by this case directly affect every insolvent insurer in this nation. The decision of the U.S. Court of Appeals for the Eighth Circuit has added to the existing confusion for determining when a federal statute invalidates, impairs, or supersedes a state law regulating the business of insurance for purposes of analysis under the McCarran-Ferguson Act (1945), codified at 15 U.S.C. § 1012(b) (1996). At present, six of the Courts of Appeals have formulated four different tests to apply in making such a determination, with resulting disparate outcomes. As such, state laws regulating the business of insurance receive unequal protection from preemption by federal law, and insolvent insurers are not treated uniformly by the federal courts. IAIR's interest is to ensure that the confusion under which insurance receivers are forced to administer estates is resolved.

RELEVANCY OF BRIEF

The United States Court of Appeals for the Eighth Circuit held in this case that the congressional grant of concurrent jurisdiction over certain claims under the Age Discrimination in Employment Act divests the Missouri receivership court of its exclusive jurisdiction over claims by and against an insolvent insurer. IAIR is concerned that issues of asserted jurisdiction, invoked by claimants against insolvent insurers, should be resolved under state

insurance statutes that provide for the exclusive jurisdiction of state receivership courts. IAIR's brief explains that the present uncertain application of the McCarran-Ferguson Act by the various Courts of Appeals has the debilitating effect of dissipating estate assets, ultimately preserved for distribution to policyholders. Thus, IAIR's brief seeks to focus this Court's attention on the broader implication of the Court of Appeals for the Eighth Circuit's ruling: the harm caused to the public interest by the uncertain application of the McCarran-Ferguson Act to state insurance statutes.

CONCLUSION

IAIR respectfully requests leave to file the attached *amicus curiae* brief in support of the Petition for a Writ of Certiorari filed by Petitioners, Professional Medical Insurance Company and Professional Mutual Risk Retention Group, in Liquidation.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The International Association of Insurance Receivers ("IAIR") is a nonprofit corporation whose membership is comprised of the receivers of insolvent insurance companies across the nation and overseas. IAIR was formed in 1991 to enhance the standards governing insurance company receiverships. One of IAIR's stated purposes and objectives is to promote high standards in the administration of insurance receiverships and the prompt and efficient winding up of insurance companies.

IAIR's purposes and objectives are effected by the consistent application of state laws regulating the business of insurance to insurance receiverships. The decision of the Eighth Circuit has hampered these objectives by: (i) adding a new and fourth rationale for determining when a federal statute invalidates, impairs, or supersedes a state law regulating the business of insurance for purposes of analysis under the McCarran-Ferguson Act (1945), codified at 15 U.S.C. § 1012(b) (1996);[1] and (ii) depriving the liquidation court of its essential ability to marshal the estate's limited resources by controlling the processing of claims against the company in liquidation. As a result, state insurance receivers must administer estates with the knowledge that claims brought against

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[1] The McCarran-Ferguson Act provides in relevant part: "No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b).

them will be resolved differently, depending upon the origin of the claim and with the resulting increased cost of resolving claims in numerous federal and state courts. IAIR thus urges this Court to grant the petition of Professional Medical Insurance Company and Professional Mutual Risk Retention Group, in Liquidation (collectively "ProMed") for a writ of certiorari to review the judgment of the Eighth Circuit entered on October 4, 1996.

SUMMARY OF ARGUMENT

State insurance receivers across the nation labor under the uncertainty created by the various Courts of Appeals' inconsistent approaches to determining when a federal statute invalidates, impairs, or supersedes a state law regulating the business of insurance for the purposes of the McCarran-Ferguson Act.

In *Murff v. Professional Medical Ins. Co.*, 97 F.3d 289 (8th Cir. 1996), the Eighth Circuit held that the congressional grant of concurrent jurisdiction over claims, brought under the Age Discrimination in Employment Act of 1967, codified at 29 U.S.C. § 621 *et seq.*, divested the Missouri receivership court of its exclusive jurisdiction over claims, by and against an insolvent insurer. This decision was predicated on a test formulated by that Court, which considered, for McCarran-Ferguson purposes, the degree to which the federal law's impairment of the state regulatory statute impacted on the overall state regulatory scheme. This expression of the third prong of the test articulated in *United States Dep't of*

Treasury v. Fabe, 508 U.S. 491 (1993), preserves from federal pre-emption only those state insurance laws deemed by the court to be sufficiently central to the state regulatory scheme.

This test conflicts with the tests adopted by: (i) the First, Seventh and Ninth Circuits; (ii) the Sixth Circuit; and the (iii) Fourth Circuit, and adds to the uncertain application of the McCarran-Ferguson Act to state insurance statutes. Insurance receivers across the nation require this Court to resolve the division among the Courts of Appeals regarding the manner in which to apply the third prong of the test articulated in *Fabe*.

Insurance receivers are also charged by state insolvency acts to administer their estates under the jurisdiction of one state court. The grant of exclusive state jurisdiction allows receivers to resolve claims, efficiently and effectively, without resorting to the expense of disputing claims in state and federal courts nationwide. Receivers' ability to resolve claims in one receivership court avoids piecemeal litigation and reduces the estate's costs, advancing the preservation of estate assets for distribution to creditors and policyholders.

By divesting the state receivership court of exclusive jurisdiction, the Eighth Circuit's holding adversely impacts insurance receiverships by increasing the likelihood of piecemeal litigation with its accompanying increased costs and administrative uncertainty.

ARGUMENT

I.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT TO RESOLVE THE CONFLICT BETWEEN THE DECISIONS OF THE COURTS OF APPEALS

By further expanding the division among the Courts of Appeals regarding the manner in which to apply the third prong of the test articulated in *Fabe*, the decision of the Eighth Circuit adds to the existing confusion under which state insurance receivers administer insolvent estates.

Specifically, while acknowledging that the Missouri's Insurers Supervision, Rehabilitation and Liquidation Act (the "Insolvency Act") provides a comprehensive scheme for the winding up of insolvent insurance companies and vests exclusive jurisdiction over actions by or against the insolvent insurer in the state receivership court (Mo. Rev. Stat. § 375.1188(1)), the Eighth Circuit held that the federal Age Discrimination in Employment Act ("ADEA") could be construed to invalidate, impair, or supersede the Insolvency Act so long as the ADEA's application did not work a substantial impairment of the overall state insurance regulatory scheme.

> As we see it, however, the adjudication of an ADEA claim in federal court would not so substantially impair the deputy receiver's ability to

> effect ProMed's liquidation under the Insolvency Act as to run afoul of the proscriptions of the McCarran-Ferguson Act.

Pet. App. 8.

As discussed in ProMed's Petition, the Eight Circuit's decision exacerbates an already existing division among the Courts of Appeals by formulating yet another standard for determining whether a federal statute invalidates, impairs, or supersedes a state law regulating the business of insurance. *See* ProMed's Petition at 10-20 *citing Villafane-Neriz v. FDIC*, 75 F.3d 727 (1st Cir. 1996) (federal legislation subject to McCarran-Ferguson only "where the federal law expressly prohibit[s] acts permitted by state law or vice versa."); *Merchants Home Delivery Servs., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1492 (9th Cir.), *cert. denied*, 116 S. Ct. 418 (1995) (same); *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993) (state and federal laws proscribing identical conduct do not directly conflict with or displace each other, and may coexist under McCarran-Ferguson); *Kenty v. Bank One, N.A.*, 92 F.3d 384 (6th Cir. 1996) (Ohio statutes providing detailed regulations and remedies for unfair and deceptive acts occupy the field, supplanting federal RICO statute prohibiting identical conduct but prescribing different remedies); *Ambrose v. Blue Cross & Blue Shield of Virginia, Inc.*, 891 F. Supp. 1153 (E.D. Va. 1995), *aff'd*, No. 95-2466, 1996 U.S. App. LEXIS 22035 (4th Cir. Aug. 27, 1996) (application of federal RICO statute precluded because it would invalidate, impair and supersede enforcement of state insurance code prohibition of identical conduct). *Cf. Murff v. Professional Medical Ins. Co.*, 97 F.3d 289 (8th Cir. 1996) (state

statute regulating the business of insurance and providing for exclusive state court jurisdiction of claims against insolvent insurance companies may be preempted by federal law so long as exercise of federal jurisdiction would not substantially impair the ability to effect the insolvent insurer's liquidation).

Although the inconsistent standards developed by the various Courts of Appeals affect the regulation of insurance generally, they pose particular potential harm to the regulation and administration of insurer insolvencies. Because insurance companies often issue insurance policies nationwide, the receiver of any given insolvent insurer is potentially subject to federal jurisdiction in any federal district court, for claims brought against the insolvent estate. The various provisions of Missouri's Insolvency Act, and those of other states, would be preempted, or not, depending upon the district court in which the claimant commences suit.

Thus, to avoid negation of a state law regulating the business of insurance, a receiver haled into a federal district court in the Fourth Circuit will have to show that the federal statute would "invalidate, impair, or supersede"[2] the state insurance law. A receiver haled into a federal district court in the Sixth Circuit will have to show that the federal law requires a "different standard of conduct"[3] than what is required by the state insurance law. A receiver haled into a federal district court in the

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[2] *Ambrose v. Blue Cross & Blue Shield of Virginia, Inc.*, 891 F. Supp. 1153 (E.D. Va. 1995), *aff'd*, No. 95-2466, 1996 U.S. App. LEXIS 22035 (4th Cir. Aug. 27, 1996).

[3] *Kenty v. Bank One, N.A.*, 92 F.3d 384 (6th Cir. 1996).

First, Seventh or Ninth Circuits will have to show that the federal law "directly conflicts"[4] with the state law by "expressly prohibiting acts permitted by state law or vice versa."[5] A receiver haled into a federal district court in the Eighth Circuit will have to show not only that the federal law directly conflicts with a given state law, but that the federal law does so in a way that substantially impairs the overall regulatory scheme.[6]

As a result, state laws regulating the business of insurance receive disparate protection from preemption by federal law, and insolvent insurers are not treated uniformly by the federal courts. Resolution of the conflicts among the Courts of Appeals would encourage consistent rulings as to the applicability of the state insurance insolvency statutes (and other laws enacted for the purpose of regulating the business of insurance) of the fifty states.

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[4] *Villafane-Neriz v. FDIC*, 75 F.3d 727 (1st Cir. 1996); *Merchants Home Delivery Servs., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, (9th Cir.), *cert. denied*, 116 S. Ct. 418 (1995); *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993).

[5] *Merchants Home Delivery Servs., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1492 (9th Cir.), *cert. denied*, 116 S. Ct. 418 (1995).

[6] *Murff v. Professional Medical Ins. Co.*, 97 F.3d 289 (8th Cir. 1996).

II.

IN IGNORING MISSOURI'S DETERMINATION THAT THE ORDERLY RESOLUTION OF THE AFFAIRS OF INSOLVENT INSURERS REQUIRES A SINGLE FORUM FOR THE DISPOSITION OF CLAIMS AGAINST THE ASSETS OF THE ESTATE, THE EIGHTH CIRCUIT HAS IMPAIRED THE RECEIVERSHIP COURT'S ABILITY TO CARRY OUT ITS PURPOSE

The Eighth Circuit's decision, by divesting the state receivership court of its exclusive jurisdiction, leaves insurance receivers open to claims in every federal and state court in the nation. The additional administrative expense of defending numerous lawsuits in numerous states will dissipate estate assets otherwise marshalled for distribution to creditors and policyholders.

This Court has recently reaffirmed that the purpose of the McCarran-Ferguson Act is "broadly to give support to the existing and future state systems for regulating and taxing the business of insurance" – first by "removing obstructions which might be thought to flow from [Congress'] own power, whether dormant or exercised" and second by "declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the law of the several states . . . "; *Fabe*, 508 U.S. at 500, *citing Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429-30 (1946). The State of Missouri has determined – as Congress authorized it to do – that a stay of all competing litigation is an essential component of the insurance liquidation process and that

the Missouri receivership court shall have exclusive jurisdiction to determine all claims against the insolvent.

Thus, the Eighth Circuit's decision is in conflict with numerous federal and state cases which uphold the exclusivity of jurisdiction of state receivership courts. The Eighth Circuit itself had previously recognized that state courts retain exclusive jurisdiction over claims against insolvent insurance companies:

> Experience has demonstrated that, in order to secure an economical, efficient, and orderly liquidation and distribution of the assets of an insolvent corporation for the benefit of all creditors and stockholders, it is essential that the title, custody, and control of the assets be entrusted to a management under the supervision of a single court. Hence other courts, except when called on by the court of primary jurisdiction for assistance, are excluded from participation. This should be particularly true as to proceedings for insolvent insurance companies.

Motlow v. Southern Holdings & Sec. Corp., 95 F.2d 721, 725-26 (8th Cir.), *cert. denied*, 305 U.S. 609 (1938).

Other federal courts have also recognized the primacy of states' insolvency act provisions providing for exclusive state receivership court jurisdiction. *See Stephens v. American Int'l Ins. Co.*, 66 F.3d 41 (2d Cir. 1995) (McCarran-Ferguson Act prohibits federal preemption of Kentucky Insolvency Act's exclusive jurisdiction provision); *Corcoran v. Universal Reinsurance Corp.*, 713 F. Supp. 77 (S.D.N.Y. 1989) ("To permit resort to the removal statute to extricate this case from state court jurisdiction would 'impair, invalidate or supersede' New York's law

requiring a unified proceeding in the state court and would accordingly violate McCarran-Ferguson").

In *United States Fin. Corp. v. Warfield*, 839 F. Supp. 684 (D. Ariz. 1993), the court held that Arizona's exclusive jurisdiction statute was protected by the McCarran-Ferguson Act, holding that enforcement of the state's exclusive jurisdiction:

> aid[s] receivership courts in marshalling all the insurance company's assets into one forum where they most efficiently can be monitored, preserved, and eventually distributed to deserving insureds and beneficiaries. The provisions are an integral part of Arizona's scheme for regulating insolvent insurers and ensure efficacy of Arizona's statutory provisions that detail the administrative process through which claims against the insurer are submitted to the receiver and evaluated by the receiver and the receivership court. This process presumably is intended to and does conserve insurance company assets for ultimate payment to policyholders as well as other creditors. *Cf. Fabe*, ___ U.S. ___, 113 S.Ct. at 2212 (holding that "the preference accorded by Ohio to expenses of administering the insolvency proceeding is reasonably necessary to protect policyholders"). The provisions further serve the specific purpose of protecting receivers from having to litigate in multiple forums, which might lead to a depletion of the insurance company's assets, and ensure that questions relevant to Arizona's statutory scheme are resolved by Arizona courts.

839 F. Supp. 684, 689 (D. Ariz. 1993).

Many state courts have also held that exclusive jurisdiction by the insolvency court over claims against the insolvent insurer is necessary for the preservation of estate assets and protection of policyholders. In *Superintendent of Ins. v. International Equipment Leasing, Inc.*, 247 N.J. Super. 119, 128, 588 A.2d 883, 888 (1991), the court dismissed a suit against the liquidator of a New York insurance company. It relied on the need for exclusive jurisdiction vested in receivership courts:

> There is no reason for making the administration of an insolvent insurance company's estate by the court of the state where liquidation proceedings commenced subject to the jurisdiction of other courts. The reasons for noninterference are compelling. *By adopting the Act, the Legislature intended to secure the economical, efficient and orderly liquidation and distribution of the assets of defunct corporations for the benefits of all creditors and stockholders. To achieve the legislative intent, it is essential that title, custody and control of the assets be entrusted to a single management under the supervision of one court.*

Id. at 128 (emphasis supplied). *See also Insurance Comm'r v. Arcilio*, No. 187813, 1997 WL 9738 (Mich. Ct. App. January 10, 1997) (pursuant to McCarran-Ferguson, the Michigan Insolvency Act pre-empts any federal right to certify a class action under Fed. R. Civ. P. 23); *Baldwin-United Corp. v. Garner*, 283 Ark. 385, 393, 678 S.W.2d 754, 758 (1984), *cert. denied*, 471 U.S. 1111 (1985) (McCarran-Ferguson Act preserves injunction issued pursuant to Arkansas Insolvency Act, prohibiting bankrupt plaintiff from suing insolvent insurer in federal bankruptcy court).

The Eighth Circuit's divesture of the exclusive jurisdiction of state receivership courts will increase the costs of administering insolvent estates by adding the costs of defending myriad claims in myriad courts. A multiplicity of proceedings in different state and federal courts will also potentially result in contradictory interpretations of claims against the estate.

The Eighth Circuit's decision opens insurance insolvencies to adjudication in any number of forums, thereby causing piecemeal litigation which the grant of exclusive jurisdiction was meant to avoid. Insurance insolvency schemes will need to be developed to deal with this change in the liquidation landscape. For these reasons, the Eighth Circuit's decision should be reviewed to provide insurance receivers with a definitive answer on the question of federal jurisdiction over state-regulated insurance insolvencies.

CONCLUSION

For the forgoing reasons, IAIR respectfully requests that this Court grant ProMed's Petition for a writ of certiorari to issue to the United States Court of Appeals for the Eighth Circuit so that this Court may review and decide the questions presented in ProMed's Petition.

Respectfully submitted,

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